

DATE: JUNE 11, 1996

CASE NO: 94-INA-577

In the Matter of

WESTERN BEEF
Employer

on behalf of

OLEGARIO ROBERTO THOMAS
Alien

Before: Jarvis, Vittone and Wood
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Western Beef's ("Employer") request for review of the U.S. Department of Labor Certifying Officer's ("CO") denial of a labor certification application. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On August 24, 1992, the Employer filed a Form ETA 750, Application for Alien Labor Certification, with the New York State Department of Labor ("NYDOL") on behalf of

the Alien, Olegario Roberto Thomas. AF 4. The job opportunity was listed as "Utilities & Maintenance Supervisor," and the requirements were four years of college, a B.S. degree in Electrical Engineering and four years of experience in the job offered. AF 31. The job duties were listed as follows:

Conducts testing of electrical components, equipment and systems used for refrigeration and air conditioning. Directs activities concerning installation and operation of equipment and systems to insure proper conformance. Directs and coordinates operation and maintenance and repair activities of generators, transformers, relays, switches, motors and other electro-mechanical devices.

AF 31.

On May 5, 1993, the NYDOL requested that the Employer clarify portions of the application. AF 21. Among other things, the NYDOL indicated that the job as described normally does not require four years of college and a B.S. degree in electrical engineering, and it therefore requested that the Employer either delete or submit documentation justifying these requirements. AF 20. On June 14, 1993, the Employer, through its counsel, sent a letter to the NYDOL, informing it that a B.S. in electrical engineering is a minimum requirement for the job because of the company's use of "complicated and technical electrical and refrigeration systems," and because of "the extreme acknowledge [sic] required in conducting tests of electrical components, equipment and systems used in the refrigeration and air conditioning and in keeping same operative at all times." AF 22-23. Employer's counsel explained that Western Beef is a national wholesale distributor of beef that maintains approximately 150,000 square feet of frozen meat storage containing approximately \$5,000,000 worth of refrigerated beef. Thus, according to Employer's counsel, a qualified electrical engineer must be "on the premises to review, test, repair and/or replace if necessary, various electrical components and equipment involved in [the Employer's] electrical refrigeration system" because if the refrigeration system were to become disabled, it would be "catastrophic."

The Employer was thereafter authorized to advertise the position as required by the regulations. AF 35-36. On September 30, 1992, the NYDOL notified the Employer that there were six responses to its job advertisements and forwarded to it the resumes of the applicants. AF 42. Employer was instructed to document the results of its recruitment. On November 4, 1993, Employer, through its counsel, notified NYDOL that based upon a review of the six resumes, all of the applicants lacked the minimum job requirements as stated in both the advertisement and the ETA 750 and were therefore unqualified for the position. AF 60-62. Since Employer's recruitment effort had been unsuccessful, the application was sent to the CO on January 12, 1994. AF 69.

On March 22, 1994, the CO issued a Notice of Findings ("NOF") proposing to deny the application. AF 70-74. Among other things, the CO found that the Employer's requirement that the applicant have a B.S. degree in electrical engineering is excessive, restrictive and tailored to the educational background of the Alien. The CO noted that a B.S. degree is not customarily required for this or similar job opportunities and found that the Employer's counsel's June 14, 1993 letter did not establish that this requirement arises out of a business necessity. AF 73. Thus, the CO indicated that the Employer could either expand its educational requirements or document how the requirement arises from business necessity. In addition, the CO requested that the Employer document why other "highly rated degrees, i.e., Mechanical Engineering, would not be an equally acceptable field of

study" and why U.S. workers with Associate Degrees or other technical training could not perform the job duties as described. AF 72. The CO also found that the Employer did not engage in a good faith recruitment effort. The CO noted that although four of the applicants' resumes list experience that raises a reasonable possibility that these applicants are qualified for the job, the Employer did not "further investigate" their credentials as required and therefore failed to show that they were not "'able, willing, qualified and available' to perform the work." The CO therefore required the Employer to document that applicants John M. Martens, Singh Jhalman, Tang Huanbin and Dominique S. Dieng, by their education, training, experience, or a combination thereof, are unable to perform the duties involved in the occupation. AF 70.

The Employer responded with rebuttal on April 8, 1994. AF 77-80. The Employer explained that it has "always required" that someone in the position offered have a B.S. degree in electrical engineering, as well as "specific work experience with the electrical components of a computer systems control, wiring, pumps and motors associated with refrigeration and air conditioning system." In addition, the Employer stated that the requirement of "at least a baccalaureate degree in the position offered is a minimum standard requirement throughout the industry." AF 79-80. According to the Employer, it presently employs full-time electrical engineers and electricians. *Id.* The Employer indicated that "a B.S. Degree in Electrical Engineering is an absolute minimum requirement, and other related degrees, are not acceptable for the job offered" because of the "uniqueness and complexity" of the Employer's refrigeration systems and the tasks involved in maintaining these systems and because of the "disastrous" consequences if these systems were not properly maintained and became disabled. AF 77, 79. The Employer's rebuttal also contained its reasons for rejecting applicants Martens, Dieng, Jhalman, and Huanbin, which included a lack of the required number of years of experience in the job offered. The Employer also indicated that applicant Huanbin was rejected because he had no supervisory experience. AF 78.

The CO issued a Final Determination ("FD") denying certification on April 25, 1994. AF 83-87. The CO found that the Employer had not established business necessity. In addition, the CO indicated that although she had accepted the Employer's disposition of candidates Jhalman and Huanbin's applications, the Employer's assertion that applicants Martens and Dieng "appeared" not to be qualified was not sufficient to show that they were not in fact qualified for the position, particularly without the benefit of contact or an interview. AF 84. The CO also noted that the Employer rejected these U.S. workers because their experience was not related to the meat industry, despite the fact that this requirement is not mentioned in the application and the fact that the Alien also lacks this experience. AF 84.

Employer filed a request for review and supporting brief on May 25, 1994. AF 97-100.

DISCUSSION

In the instant case, the CO determined that the Employer had failed to show a business necessity for its requirement of a B.S. degree in electrical engineering. In the FD, the CO stated that:

Employer's rebuttal reiterates that due to the "nature of our business it would be catastrophic if our refrigeration system were to become disabled", that the employer has "always required" a degree and such requirement is "standard".

Employer provides no explanation concerning other fields of study and does not address why, if a degree is required, a Mechanical Engineering degree would not be equally acceptable. Additionally, employer leaves unaddressed our requirement that the employer explain why a qualified and experienced Utilities and Maintenance Supervisor with no or lesser degree/formal training could not successfully perform in the job opportunity. Our objection to this restrictive requirement remains.

AF 86.

To establish a business necessity for a particular job requirement, the Employer must show that the requirement bears a reasonable relationship to the occupation in the context of the Employer's business and that the requirement is essential to performing, in a reasonable manner, the job duties as described by the Employer. *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*). Of particular relevance is evidence which discusses the Employer's business and the necessity of the job requirements to perform the job duties. *Texas A & M University*, 88-INA-162 (Mar. 1, 1989). The business necessity of a particular educational degree is not established where the employer fails to establish why an employee holding a similar degree could not perform the job duties. *Atlantic Sales, Incorporated*, 88-INA-349 (May 24, 1989) (*en banc*).

In the instant case, the Employer has failed to establish with sufficient documentation that the requirement of a B.S. degree in electrical engineering is essential to perform the job duties in a reasonable manner. Although the Employer states that it has complex and technical electrical and refrigeration systems and that "extensive education and training in electrical engineering" is required to perform the duties of the job, the Employer does not specifically document the particular type of training or qualifications that an electrical engineer has that would dictate that only he or she could perform the job duties, as opposed to another applicant with a Mechanical Engineering degree or an applicant with a lesser degree, but with formal training. Vague and incomplete rebuttal documentation will not meet the employer's burden of establishing business necessity. *Analysts International Corporation*, 90-INA-387 (July 30, 1991). Moreover, the Employer does not provide any support for its assertion that the requirement of a degree in electrical engineering is normal in the industry. See *ARCO Oil & Gas Company*, 89-INA-295 (May 22, 1991). Business necessity for a restrictive degree requirement is not established where the employer fails to provide supporting documentation. *John Hancock Financial Services*, 91-INA-131 (June 4, 1992).

The Board has held that the requirement of a good faith effort to recruit qualified U.S. workers is implicit in the regulations found at Title 20 of the Code of Federal Regulations, Part 656. *H.C. La March Ente., Inc.*, 87-INA-607 (Oct. 27, 1988). Actions by the employer that do not show a good faith recruitment effort or that prevent qualified U.S. workers from further pursuing their applications are therefore a basis for denying certification. *Oriental Healing Arts Institute*, 93-INA-75 (Sept. 26, 1994). In such circumstances, the employer fails to show that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work. *Id.*; 20 C.F.R. §656.1.

Here, the Employer's response indicates that it initially rejected Dominique S. Dieng, without the benefit of an interview, because:

Mr. Dieng's resume was void of any reference to experience in the job offered.

. . . Mr. Dieng's experience at the Brooklyn Navy yards has no relationship to the job offered.

AF 79. As noted by the CO and clearly indicated in Mr. Dieng's resume, this U.S. applicant has a B.S. degree in electrical engineering. Furthermore, although apparently overlooked by the Employer, Mr. Dieng's resume lists two years of experience as a Maintenance Supervisor where he was "directly involved with the preventative maintenance program for all HVAC, power conditioners [sic], . . . emergency generators and electronic controls," as well as four years of experience as a Maintenance Engineer where he "*directed*, planned and evaluated all aspects of Maintenance, contracting supervision, quality control and preventative maintenance schedule." AF 47 (emphasis added). The term "*directed*" implies that the applicant was acting in a supervisory capacity while in this position, thereby indicating that he was a manager and/or supervisor. *See* AF 34. Thus, Mr. Dieng's resume raises the prospect that he meets all of the Employer's stated requirements. Therefore, it was the Employer's duty to inquire further, by interview or other means, and not to reject him summarily. *Gorchev & Gorchev Graphic Design*, 89-INA-118 (Nov. 29, 1990) (*en banc*); *Mike's Refrigeration*, 90-INA-258 (July 30, 1991); *Moda Linea, Inc.*, 90-INA-424 (Dec. 11, 1991).

In addition, Employer rejected applicant Martens because he did not have a B.S. in electrical engineering (AF 60) and because his four years of supervisory experience in maintenance and repair appeared "to be in high-rise buildings in operation and maintenance of boilers and high pressure steam systems. Our business [is] totally related to meats" (AF 79). We note, however, that the Employer did not list experience in the meat industry as a requirement for the job opportunity. Where an employer contemplates that certain duties specified in its job description require experience in a specific industry or part thereof, these requirements must be specified by the employer. Rejection of U.S. workers for not meeting unspecified requirements constitutes a rejection for an unlawful, non job-related reason under §656.21(b)(6). *Jennifer Richards, Inc.*, 93-INA-143 (Jan. 31, 1995); *Micro-Tool and Fabricating*, 90-INA-404 (Mar. 12, 1992); *L.M.C. Corporation*, 91-INA-34 (Jan. 26, 1993); *Zuma Studios*, 91-INA-289 (Dec. 11, 1992); *Reliant Construction Corp.*, 90-INA-472 (Jan. 28, 1992); *LCG Media*, 91-INA-371 (Sept. 27, 1990).

Furthermore, as noted above, business necessity for a restrictive degree requirement is not established where an employer fails to provide supporting documentation, *John Hancock Financial Services*, 91-INA-131 (June 4, 1992), and the Employer failed to do so in this case. Applicant Martens, who has well over four years of supervisory experience in the operation, maintenance and repair of various mechanical equipment and air conditioning and refrigeration training, appeared qualified for the position and was rejected without an interview because he did not possess the restrictive degree. Employer had a duty to further investigate his credentials. *Wilton Stationers, Inc.*, 94-INA-232 (April 29, 1995). We therefore find that the CO properly found that applicant Martens was rejected for other than lawful job-related reasons. Section 656.21(b)(6); *Jana Corporation*, 94-INA-5 (Dec. 21, 1994); *Drake College*, 94-INA-125 (March 31, 1995). Accordingly, the CO appropriately denied certification.

ORDER

The CO's denial of certification is AFFIRMED.

For the Panel:

DONALD B. JARVIS
Administrative Law Judge

DBJ/mg/bg